No. 02-15475

Before the Honorable Bobby R. Baldock, Andrew J. Kleinfeld,
and Johnnie B. Rawlinson, Circuit Judges,
Opinion filed December 16, 2004

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD CRAIG KESSER,	)	CASE NO. 02-15475
	)	
Petitioner and Appellant,	)	[USDC NO. 96-3452 PJH]
	)	
vs.	)	
	)	
STEVEN A. CAMBRA,	)	
	)	
Respondent and Appellee.	)	
_____	/	

PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

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No. 02-15475

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD CRAIG KESSER, Petitioner and Appellant, vs. STEVEN A. CAMBRA, Respondent and Appellee.	CASE NO. 02-15475 [USDC NO. 96-3452 PJH] **PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**

INTRODUCTION

Pursuant to Fed. R. App. P. 35(b) and 40(a), Richard Craig Kesser petitions this Court for rehearing and suggests that rehearing *en banc* is appropriate. This case involves a challenge by the defense pursuant to Batson v. Kentucky, 476 U.S. 79 (1986) to the prosecutor's striking all Native American (and all minority) jurors from Petitioner's jury.

The Supreme Court recently reiterated the Batson three-step process in Miller-El v. Cockrell, 537 U.S. 322, 328 (2003):

> First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. Second, if that

> showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the party's submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Rehearing is necessary because the panel's majority opinion (written by a visiting judge) sanctioned the prosecutor's use of race-based reasons for striking all Native American jurors by approving the use of "mixed-motive analysis" at step-two of the Batson process contrary to Supreme Court opinions which hold that the Prosecutor, at step-two, must provide race-neutral reasons for his strike, See Miller-El v. Cockrell, supra at 537 U.S. 322; Purkett v. Elam, 514 U.S. 765 (1995); Powers v. Ohio, 499 U.S. 402 (1991); Hernandez v. New York, 500 U.S. 352 (1991), and contrary to this Circuits opinions rejecting any use of racial bias in the jury selection process, See U.S. v. DeGross, 913 F.2d 1417 (9th Cir. 1990); U.S. v. Bishop, 959 F.2d 820 (9th Cir. 1992); U.S. v. Omoruye, 7 F.3d 880 (9th Cir. 1993).

Rehearing *en banc* is also warranted because, assuming arguendo that a mixed-motive analysis is permissible, the majority applied it incorrectly. Rather, once that the prosecutor offers an explanation that includes a discriminatory motive, it is his burden to establish, by a preponderance of the evidence, that he would have challenged the juror absent the discriminatory motive. Moreover, the opinion neglects to recognize that the California Court of Appeal (hereinafter

"DCA") decision – to which it defers – did not conduct a mixed-motive analysis, and did not find, by a preponderance of the evidence, that the prosecutor would have exercised the strikes despite his racist animus.

Furthermore, the opinion overlooked crucial facts. It acknowledged that the prosecutor, at step-two, offered both racially biased and race-neutral explanations for his peremptory challenge of one Native American juror, but was incorrect in stating that the prosecutor provided only race-neutral reasons for striking the only other two Native American jurors.

Furthermore, the opinion was wrong in rejecting the use of comparative juror analysis because it deferred to the DCA opinion and held such analysis was unnecessary.

Finally, *en banc* review is warranted because the issues raised are vitally important in our multi-racial/ethnic society.

STATEMENT OF FACTS

During *voir dire*, the prosecutor challenged, and the trial court excused, all three Native American jurors, Ms. Rindels, Ms. Smithfield, and Ms. Lawton, and the only other minority juror, Ms. Nakata (RT 3308, 3325-3326, 3352, 3359, 3362,

3363). The defense immediately called the trial court's attention to this pattern of exclusion. (RT 3366-3368, ER 77).The trial court found that the prosecutor had challenged members of a "cognizable group," Native Americans, and the prosecutor proffered explanations for his strikes (RT 3373-3374, ER 80-81):

> MR. DIKEMAN: Miss Rindels was the darker skinned ... native American female. She works for the tribe....
>
> . . .
>
> My experience is that native Americans who are employed by the tribe are a little more prone to associate themselves with the culture and beliefs of the tribe than they are with the mainstream system, and my experience is that they are sometimes resistive of the criminal justice system generally and somewhat suspicious of the system.

RT 3378, ER 84-85

The prosecutor then opined that Ms. Rindels was self-important, emotional about the system, and that her family was dysfunctional. *Id.*

Thereafter, the prosecutor discussed his reasons for excluding the remaining two Native American jurors, and finally gave his reasons for excluding the only other minority juror. RT 3379-3384; ER 84-92.

After the prosecutor gave all his reasons for those challenges, the following discussion concerning the prosecutor's philosophy took place:

> MR. BRAGG [Petitioner's counsel]: Your Honor, I believe that the expressed concern that Mr. Dikeman had, particularly Miss Rindels, is a classic example of what the Court -- in fact would be used by the appellate courts as a basis for exclusion, because it's a presumption of a group bias based on stereotype membership in a racial group, and I think that-

THE COURT: I don't believe that's what it said.

MR. BRAGG: That's what I heard. Native Americans that work for tribes are a little more prone to identify with the culture of the tribe, and feel alienated and are not willing to accept the -- what is perceived to be the wide judicial system and the ethics and the legal requirements that are imposed on them by that system. That is a stereotype that is placed upon that lady because she happens to be an Indian and a member of the tribe. That's exactly what it says as far as -- that's what I heard him say, and I think that would be pegged by the appellate courts as being exactly the type of impermissible stereotyping that makes that type of peremptory unconstitutional.

MR. DIKEMAN: I would –

THE COURT: Wait a minute, I want to hear from defense counsel first.

MR. DIKEMAN: If I could say one thing on that aspect, in this county we've had Dr. Roy Alsop come in here and explain to the courts and I've seen this on the criminal calendar, child molesting is okay in certain Native American cultures and we can't treat Native American child molesters the same way we treat other child molesters, and have to treat them through the Indian cultural center and there are a whole bunch of people that violate our laws that are Native Americans and they go much more often through the Native American system than the criminal systems, and to say that does not exist is frankly incorrect. Dr. Alsop went to San Francisco and testified in the Troy case which resulted in the acquittal on a charge of murder, because there was some sort of racial bias that lasted for a long time in Siskiyou County and accounted for the killing of a police officer.

. . .

MR. BRAGG: Well, I've gone through everything that Mr. Dikeman has indicated with regard to the other jurors. It had very little to do with the five criteria he listed initially. Bias against the people as I pointed out in my points and authorities, when you look at the qualifications and these particular people, three out of four very very strong law enforcement connections. They can hardly be viewed as defen-

dants' jurors, in fact I think they would be biased for the People, if anything – biased in favor of the people.

His comments with regard to everything else that he really is claiming as a basis for excusing these people has nothing to do with the five criteria that he offered.

THE COURT: All right. The Court finds there is sufficient justification to support the peremptory challenges. With regard to Miss Rindels, my understanding of what Mr. Dikeman said is that -- one of them is at least that she worked for the tribe, not because she was one of the tribe, but she worked for the tribe. That's entirely different, other than the fact if she's Indian, if she is. I gather that she is.

What other matters were we going to take up this morning?

(RT 3384-87, ER 92-95)

The majority opinion incorrectly states that the prosecutor "offered entirely ethnic-neutral reasons for his peremptory challenges against Lawton and Smithfield." Kesser v. Cambra, 2004 U.S. App. LEXIS 2 6105 *5. The opinion addresses only the prosecutor's racist statement about Juror Rindels, "the darker-skinned Native American female," who was "resistive" and "suspicious of the system". The opinion failed to consider the prosecutor's clearly articulated philosophy – that Native Americans are unfit to serve as jurors. That is when the prosecutor interrupted the trial court and defense counsel in order to make his views heard: "there are a whole bunch of people that violate our laws that are Native Americans" that treat criminals differently "and to say that does not exist is frankly incorrect." (RT 3387, ER 95) As Judge Rawlinson stated in her dissent: "Although this case

had nothing to do with child molesting, the prosecutor took great pains to inform the court that, at least in his view, the Native American culture is at odds with the criminal justice system" (Kesser v. Cambra, 2004 U.S. App. LEXIS 2 6105 *48-49) and the prosecutor "smeared an entire race of people, expressly assuming that Native American people are unwilling to adhere to 'our laws' ...and are unfit for jury duty. Kesser v. Cambra, 2004 U.S. App. LEXIS 2 6105 *52.

It is against this factual backdrop that this case must be analyzed, but was not.

ARGUMENT

I. PERMITTING RACE-BASED REASONS FOR STRIKING A JUROR, AS THE MIXED-MOTIVE ANALYSIS DOES, IS CONTRARY TO OR A MISAPPLICATION OF BATSON AND ITS PROGENY.

The majority opinion stated that the Supreme Court "had provided no indication" that the mixed-motive analysis does not fit within the Batson ruling. Kesser v. Cambra, 2004 U.S. App. LEXIS 26105 *23. But Supreme Court opinions (and Ninth Circuit cases interpreting them) have rejected the mixed-motive analysis in the Batson context.

The Supreme Court's goal in Batson is/was to eliminate discrimination from the jury selection process:

The harm from discriminatory jury selection extends beyond that

> inflicted on the defendant and the excluded juror to touch the entire community. Batson at 87.

This objective was confirmed in Powers v. Ohio, supra at 499 U.S. 402, 409-410:

> Batson recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large. ... A person's race is simply unrelated to his fitness as a juror.

The Batson three-step framework was formulated to insure that race was not a factor in the jury selection was process. Hence, as this Court held in Stubbs v. Gomez, 189 F.3d 1099, 1105 (9th Cir. 1999):

> At the second step in the Batson analysis, the burden shifts to the prosecution to articulate a race-neutral explanation for the exercise of the peremptory challenge in question. We review de novo a district court's holding that a prosecutor's proffered reason for a peremptory challenge is race-neutral.

The Supreme Court in Hernandez v. New York, supra, at 500 U.S. 352, 359, stated:

> In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.

The High Court has consistently held that to reach step-three, the prosecutor must provide a race-neutral explanation for the strike at the second step of the inquiry.

In Purkett v.Elem, supra at 514 U.S. 765, 768, the Supreme Court stated:

> At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation.

Last year, in Miller-El, supra, at 537 U.S. 338, the Supreme Court confirmed that

step-two is satisfied only when the prosecution offers "facially race neutral reasons for [its] strikes."

This Circuit has rigorously enforced the mandate of Batson when one of the explanations provided by the prosecutor was not race-neutral. In U.S. v. DeGross, supra at 913 F.2d 1417, 1426, fn. 11, the prosecutor excluded a Hispanic woman, stating that he wanted an equal representation of men and women on the jury. He further indicated that he excluded that juror because she had "a language barrier" and "she was not too bright." This Court reversed because the first reason "constituted an admission of purposeful gender discrimination ...." In U.S. v. Omoruyi,supra, at 7 F.3d 880, 881-882, this Circuit reversed the defendant's conviction because the neutral explanations offered by the state were irrelevant "in the face of the prosecutor's statements expressly admitting a discriminatory motive". In U.S. v. Bishop, supra at 959 F.2d 820, 827, the Court found that there were race-based and race-neutral reasons for excluding a juror. Again reversing the conviction, this Court stated: "As a result, we cannot find that race was not a factor in his decision. The prosecutor did not meet his burden of articulating a racially-neutral explanation for striking [the juror].

This Court's decisions are persuasive authority in applying Supreme Court law:

> Our cases may be persuasive authority for ...determining whether a particular state court decision is an "unreasonable application" of Supreme Court law, and ...what law is "clearly established." ... [Further,] "to the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness vel non of the state court's treatment of the contested issue."

Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir. 1999)

In Miller-El, supra at 537 U.S. 322, the Supreme Court expressly reaffirmed its determination to eliminate race discrimination in jury selection. Batson and its progeny have made it clear that the courts will not tolerate racial stereotyping as a basis for the exercise of a peremptory challenge. At step-two, the state may not voice racism as a philosophy/factor in selecting a juror. This step-two principle will affect very few cases, however it will uphold/insure defendants' right to a jury selected on non-racial grounds, and (minority) jurors' right to serve on juries. However, permitting mixed-motive analysis will actually open the floodgates to racist comments/reasons for strikes, demeaning the jury selection process and the reputation of the judiciary.

II. THE MIXED-MOTIVE ANALYSIS, IF APPLICABLE, WAS WRONGLY APPLIED AND/OR WAIVED

Even if Batson and its progeny permit the mixed-motive analysis, it was wrongly applied by the majority and/or waived by Respondent. The majority cites

Howard v. Senkowski, 986 F.2d 24 (2nd Cir. 1993) and opinions from other circuits that apply the mixed-motive analysis (dual-motive analysis). It acknowledges this analysis derives from the Supreme Court (Equal Protection) case of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266, 270 n.21 (1977), and quotes therefrom as follows:

> Proof that the decision ... was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted...the burden of establishing the same decision would have resulted even had the impermissible purpose not been considered. If this were not the established, the complaining party ... no longer fairly could attribut the injury complained of to improper consideration of discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.

Kesser v. Cambra, 2004 U.S. App. LEXIS 2 6105 *31-32.

In Howard, the prosecutor used peremptory challenges to strike the only two black members of the jury. When asked if race was a factor, the prosecutor said "Yes," but it was not an "overriding" factor or a "major" factor, and elaborated on race-neutral explanations for the strike. The state court judge determined that Howard had failed to establish purposeful discrimination. That ruling was upheld on appeal, and the district court denied habeas relief.

The Second Circuit held that dual-motivation analysis was required:

> Once the claimant has proven improper motivation, dual motivation

> analysis is available to the person accused of discrimination to avoid liability by showing that the same action would have been taken in the absence of the improper motivation that the claimant has proven.
>
> In effect, [the prosecutor] is permitted to show, if he can, that the improper motivation proved by [the Petitioner] was only part, and not the decisive part, of the motivation.

Id. at 26-27.

The Second Circuit determined that the issue was a question of fact and remanded to the district court to determine whether "the prosecutor could sustain his burden of showing that he would have exercised his challenges solely for race-neutral reasons." It did so despite the prosecutor's statement that while race was a factor, it was not the decisive factor in his challenge. In our case, the prosecutor did not make that showing, the trial court didn't rule on/recognize the race-based explanation provided, and the DCA did not conduct a hearing. The district court and this panel deferred to the DCA, even though it too did not require the prosecutor prove, by a preponderance of the evidence, that he would have struck all the Native American jurors for reasons other then his racial bias.

The majority opinion cites Arlington Heights, Howard and other cases, as authority for permitting the prosecutor to provide raced-based reasons for his strike, but does not require the prosecutor to prove he/she would have challenged the juror anyway. Instead, the majority incorrectly jumps directly to Batson's step-

three, and holds that the DCA correctly found that Petitioner did not meet his burden of proof at that step. As discussed below, the majority conflated these two separate phases/steps of the analysis and relieved the state court of its responsibility to conduct a full Batson inquiry. In its rigorous enforcement of the Supreme Court's Batson mandate, this Court has insisted that trial courts may not short-circuit the three-step process. See Lewis v. Lewis, 321 F.3d 824 (9th Cir. 2003); U.S. v. Alanis, 335 F.3d 965, 969 n. 5 (9th Cir. 2003).

Petitioner submits that reversal, rather than remand, is required because the prosecutor's racial animus is so pervasive that he could not meet his burden, as a matter of law. At the least, the mixed-motive analysis requires a remand to determine if the prosecutor can prove that the race-based reasons/philosophy he provided were not the reasons he challenged all Native American jurors, and he would have challenged them anyway.

Howard was decided in 1993. Respondent never raised Howard, or any affirmative defense, in the state courts. Respondent's brief in the DCA was filed in 1994, and the DCA's opinion was filed in 1995; neither mentioned Howard or the mixed-motive analysis. Respondent's argument was simply that the trial court was factually correct: no raced-based reason was stated by the prosecutor.

Respondent's position did not change in the federal district court. Respon-

dent filed a 51-page opposition brief in 1997 (four years after Howard); no reference to Howard/or any-affirmative defense was made (DKT 13).

Only in this Court, in its responsive brief, did Respondent admit that the trial court erred, while insisting that the DCA conducted a Howard hearing. Appellees Brief, p. 18-22.) Petitioner submits that Respondent has waived its opportunity for such a hearing. See Scott v. Collins, 286 F.3d 923, 927-28 (6th Cir. 2002) (because the state didn't raise the statute of limitations affirmative defense, it was waived.); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991) (because the state didn't timely assert lack of jurisdiction defense, it was waived); Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998), (state's defense of abuse of writ was waived because there was no evidentiary record); See also F.R.C.P. 8(c).

III. NO FINDING WAS MADE BY THE DCA, AND NO DEFERENCE IS DUE.

The majority opinion gives deference to the DCA by incorrectly stating that the DCA,

> concluded the prosecutor's *voir dire* did not violate the Equal Protection Clause because the "'predominant motive' in excluding Juror Rindels was not ethnic or racial bias." The state appeal court's finding that Rindels' ethnicity was not the "predominant motive" for her challenge is the equivalent of a Batson third-step finding that the prosecutor would have challenged Rindels regardless of her ethnicity. Consequently, Petitioner failed to establish intentional or purposeful discrimination on the part of the State.

Kesser v. Cambra, 2004 U.S. App. LEXIS 26105, *38-39.

But the DCA made no such finding. As to Juror Rindels only, it expressed concern about the prosecution's explanation that the she was "resistive . . . suspicious of the system," but also noted that four race-neutral reasons were provided by the prosecutor, concluding by stating:

> Since the trial court could reasonably have found, based on several race-neutral explanations, that the prosecutor's "predominant motive" in excluding Juror Rindels was not ethnic or racial bias, its denial of the Wheeler challenge may not be disturbed.

(ER 63)

The DCA utterly failed to conduct the third step of the Batson inquiry at which all the circumstances supporting Petitioner's prima facie showing must be considered. Because it conducted no step-three analysis, it failed to weigh the following facts:

1. The prosecutor's racist stereotyping of Native American prospective jurors: "Native Americans" treat criminals differently "and to say that isn't true is frankly incorrect",

2. All Native American jurors were challenged,

3. All minority jurors were challenged,

4. The trial court did not rule on/recognize the prosecutor racist explanations.

It simply deferred to the trial court, stating that, as to Juror Rindels only, one overall racist philosophy balanced against four race-neutral reasons, means

racism did not predominate.

In Lewis v. Lewis, supra at 321 F.3d 824, the trial court accepted the prosecutor's reasons for striking one of two African American jurors, and the DCA found those reasons, and a reason not mentioned by the trial court, valid. This Court reversed, explaining that the appropriate analysis to be conducted by the trial court at the third step:

> To fulfill its duty, the court must evaluate the prosecutor's proffered reasons. "A finding of discriminatory intent turns largely on the court's evaluation of the prosecutor's credibility." As with any credibility finding, the court's own observations are of paramount importance. Other factors come into play... if a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination. Similarly, a comparative analysis of the struck juror with empaneled jurors "is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." After analyzing each of the prosecutor's proffered reasons, our precedent suggests that the court should then step back and evaluate all of the reasons together. [F]aulty reasons... may undermine the prosecutor's credibility...such...that a court should sustain a Batson challenge. (Footnotes omitted)

Id. at 830-831.

Of particular import, the Court in Lewis held that the trial court may not short-circuit the procedures required by Batson:

> The appellate court did not rectify the trial court's failure to conduct a proper step-three inquiry. Unlike a trial court, a court of appeal is not in an ideal position to conduct a step-three evaluation. *Id.*, 832

The DCA had upheld the challenge on an alternative ground, one not determined

by the trial court: the juror was a "loner." This Circuit rejected that ground,

> [T]he new reason on which the appellate court relied depends entirely on the prosecutor's credibility. . . . Thus, in order to accept that reason, the Court of Appeal had to deem the prosecutor credible, a factual determination that is uniquely the province of the trial court.

Id. at 833-834.

See also U.S. v. Alanis, supra at 335 F.3d 965, 969 n. 5, ("[I]t is for the trial court, rather than the appeals court, to perform the third step of the Batson process....") Therefore, the majority erred when it deferred to the DCA's "finding," which was an unreasonable application of the facts and an incorrect application of the law.

IV. THE MAJORITY ERRED BY NOT REVIEWING THE COMPARATIVE JUROR ANALYSIS SUBMITTED BY PETITIONER.

The majority's opinion rejects Petitioner's submission concerning comparative juror analysis because it was not presented to the trial court. Kesser v. Cambra, 2004 U.S. App. LEXIS 2 6105, *44. The majority cites Miller-El, where the Supreme Court conducted a comparative juror analysis, but states that the Court had the benefit of the "record of testimony, arguments, and findings based on comparative analysis of challenged and unchallenged jurors," (Kesser v. Cambra, 2004 U.S. App. LEXIS 2 6105, *43, n. 13).

However, in Miller-El, the arguments were not made to the trial court, and the trial court made no findings concerning such arguments. (See State v. Miller-El, No. F85-78668-NL, Transcript, 5/10/88, at 837-872, lodged herewith; Miller-El, No. 01-7662, Oral Argument Transcript, at 28.)

This panel had access to the entire record, including the *voir dire* transcript and juror questionnaires. Moreover, Respondent never objected to the facts presented in Petitioner's comparative juror analysis. Respondent simply claimed that any consideration of comparative juror analysis was always inappropriate.

The comparative juror analysis made by Petitioner demonstrates that the facially neutral reasons provided were pretextual, and that the prosecutor's expressly race-based reasons for striking the Native American jurors were the only reasons for doing so.

CONCLUSION

For the forgoing reasons, Petitioner requests that the panel grant rehearing or, in the alternative, that the Court order the case reheard *en banc*, vacate the December 16, 2004 disposition, and schedule the case for oral argument.

Respectfully submitted,

DATED: January 31, 2005

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To: **Panel and all active judges and any interested senior judges**

Re: **Response to petition for panel rehearing and/or petition for rehearing en banc**

02-15475 *Kesser v. Cambra*

Opinion dated 12/16/04

Panel Judges: Honorable Bobby R. Baldock, Senior Judge

Honorable Andrew J. KLEINFELD, Circuit Judge

Honorable Johnnie B. RAWLINSON, Circuit Judge

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD CRAIG KESSER,

Petitioner-Appellant,

v.

STEVEN J. CAMBRA, JR., Warden,

Respondent-Appellee.

INTRODUCTION

In his petition for rehearing and rehearing en banc, to which the Court has asked us to respond, appellant and the two amici curiae challenge as incorrect the majority's application of Supreme Court precedents – primarily concerning whether the doctrines of "mixed motive analysis" and "comparative juror analysis" are compatible with *Batson v. Kentucky*, 476 U.S. 79 (1986) – in the majority's analysis of the state prosecutor's peremptory challenges to three Native American prospective jurors (Rindels, Lawton and Smithfield) in the murder trial of appellant and his two co-defendants Leahy and Chiara. *See Kesser v. Cambra*,

392 F.3d 327, 336-42 (9th Cir. 2004). Appellant urges rejection of mixed motive analysis and adoption of comparative juror analysis. Appellee urges this Court to join in other courts' adoption of mixed motive analysis where, as here, the prosecutor discussed various motives in exercising the three peremptory challenges at issue. Appellee also urges rejection of comparative juror analysis where, as here, at no time did the three defense attorneys assert in the trial court that a comparison of white and Native American prospective jurors' responses to questioning showed a discriminatory intent in striking the three Native American prospective jurors.

Appellant and the amici contend that mixed motive analysis is "contrary to" established Supreme Court and Ninth Circuit precedent. Alternatively, they argue that even if not contrary, the doctrine was applied "incorrectly" in this case by the majority, and its application was waived by appellee for failing to assert it in either the state court of appeal or the federal district court. Appellant and the amici also argue that the state court of appeal failed to make a *Batson* "third-step" evaluation of evidence as to the prosecutor's "predominant" reason for striking the three Native American prospective jurors, and that therefore no deference is due to the state court's conclusion that the prosecutor was not motivated by racial bias.

Regarding the majority's rejection of comparative juror analysis,

appellant claims the majority erred in failing to consider the jury voir dire and questionnaires (which were discussed by the parties in their briefs), and in agreeing with appellee that comparative juror analysis is impossible on such a "cold record," i.e., where there was no hearing on such a claim in the trial court either during jury selection or on remand, as the majority noted was done in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

Contrary to the assertions of appellant and the amici, the state court of appeal, and this Court, properly recognized, and applied, mixed motive analysis, and properly rejected any application of comparative juror analysis on a cold record. Accordingly, the petition for rehearing and rehearing en banc should be denied.

ARGUMENT

I.

THE MAJORITY CORRECTLY HELD THAT THE STATE COURT OF APPEAL'S USE OF MIXED MOTIVE ANALYSIS WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF SUPREME COURT PRECEDENT

The majority correctly framed the mixed motive issue thus: "The controversy surrounds the state appeal court's decision to proceed to step three of *Batson* despite the prosecutor's admission that his decision to challenge veniremember Rindels was based on, among other factors, ethnicity." *Kesser v. Cambra*, 392 F.3d at 336. Contrary to the contention of appellant and the amici, the majority was correct in holding that the state court of appeal used a mixed motive analysis, and that the analysis was not an unreasonable application of clearly established Supreme Court law.[1/] In its discussion of the state prosecutor's

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1. The majority, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), analyzed the state court of appeal's use of mixed motive analysis under the "unreasonable application of" clause, rather than the "contrary to" clause of 28 U.S.C. § 2254(d), because the Supreme Court "has not addressed *Batson*'s application in a case where a prosecutor tenders both group-related and group-neutral reasons for a peremptory challenge." *Kesser*, 392 F.3d at 335 & n.4, citing *Williams v. Taylor*, 529 U.S. 362, 405-06, 412-13 (2000). The majority observed that a state court decision is "contrary to" Supreme Court authority only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently that the Supreme Court has on a set of materially distinguishable facts, which is not the posture of this case. 392 F.3d at 335 & n.4; *see Brewer v. Hall*, 378 F.3d 952, 955

stated reasons for striking prospective juror Rindels, the majority quoted the state appellate court's discussion (SER 19), and the prosecutor's entire statement of reasons, including the penultimate paragraph containing what the court of appeal acknowledged was a race-based reason (the prosecutor's statement that "Native Americans who are employed by the tribe" are sometimes "resistive" and "suspicious" of the criminal justice system), and the final paragraph summarizing what every court (the state trial and appellate courts, the federal district court, and this Court) concluded were his "predominant" reasons: she was "pretentious," "self-important," "unstable," "weak," "easily swayed by the defense," "emotional," her family was "dysfunctional," and her daughter had been molested by Rindels' father. *Id.* at 331-32.

The majority observed that the state appellate court specifically found these reasons, at least three of which rested upon objective criteria, were race neutral and based on individual predilection supported by the record, and that none constituted a "sham excuse" in an effort to disguise group bias. The majority observed that the state court concluded that the prosecutor's "predominant motive" was not ethnic or racial bias. *Id.* at 341-42.

Contrary to the arguments of appellant and the amici (and the dissent in

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(9th Cir. 2004).

this case), the majority's conclusion that the state court of appeal *did* utilize an express mixed motive analysis is supported in the state court's response to the three defendants' argument on appeal that the Ninth Circuit in *United States v. Bishop*, 959 F.2d 820 (9th Cir. 1992) had *not* endorsed a mixed motive analysis. First, the state court acknowledged that the prosecutor's comment about his experience with "Native Americans who are employed by the tribe" was based on a racial stereotype, but pointed out that "the prosecutor gave many more reasons for his evaluation of Mrs. Rindels as a poor juror other than the statement cited." SER 19. The court then, in a footnote, rejected the defendants' claim that this Court in *Bishop* had disapproved what has now come to be known as mixed motive analysis. SER 19, n.13.

Appellant, the amici, and the dissent, criticize the state appellate court's conclusion that the prosecutor's "predominant" motive was not race-based, on the ground that no such finding was expressly made by the trial court, thereby rendering a mixed motive analysis, and deference to the state court's conclusion, impermissible. This criticism is unfounded.

The state court of appeal's conclusion that the prosecutor's predominant motive was not race-based relied on the trial court's implied factual finding. The trial court made its finding after an extended discussion of the prosecutor's stated

reasons by all three defense attorneys, a discussion quoted in full by the federal district court. *See Kesser v. Cambra*, 2001 WL 1352607, *6 – *7 (N.D. Cal. 2001); *see also Leahy v. Farmon*, 177 F. Supp. 2d 985, 995-96 (N.D. Cal. 2001) [companion case of co-defendant Leahy, ordered joined with this appeal]. In relying on the trial court's *implied* finding, instead of an *express* finding, the state court of appeal rejected appellant's contention "that reversal is required in the absence of express factual findings by the trial court as to the prosecutor's reasons for excluding each individual juror," noting that previous California Supreme Court cases "upheld the denial of a *Wheeler*[2/] motion by implying the requisite findings by the trial court." SER 20, n.14

The state trial court here carefully elicited the prosecutor's reasons for excusing each particular juror and engaged in extended discussion with all counsel regarding these reasons before denying the *Wheeler* motions, allowing ample basis for the appellate court's factual finding.

There is no merit to the assertions of appellant, the amici, and the dissent, that the mixed motive analysis of the state court is not entitled to deference under the AEDPA because it lacked a factual underpinning due to the absence of an

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2. As this Court observed, *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), "is the functional equivalent of a *Batson* challenge." 392 F.3d at 333, n.2.

express finding by the trial court. A similar argument was rejected in *Williams v. Rhoades*, 354 F.3d 1101, 1108-09 (9th Cir. 2004), holding that the state appellate court's interpretation of implicit, unclear, or ambiguous trial court findings "are entitled to the same presumption of correctness that we afford trial court findings."

Because the state court of appeal's utilization of a mixed motive analysis was based an implicit factual finding by the trial court – a factual finding necessarily based on an evaluation of the credibility of the prosecutor's stated reasons and a determination as to which reasons were in fact the "predominant" reasons – the majority correctly concluded that the state court of appeal's analysis is entitled to deference on appeal.

The majority also correctly pointed out that, beginning with *Howard v. Senkowski*, 986 F.2d 24 (2d Cir. 1993), "the Circuit Courts confronted with the issue have uniformly endorsed mixed motive analysis in the *Batson* context." *Kesser*, 392 F.3d at 337, citing *Gattis v. Snyder,* 278 F.3d 222, 232-35 (3d Cir.2002); *Weaver v. Bowersox,* 241 F.3d 1024, 1032 (8th Cir.2001); *United States v. Tokars,* 95 F.3d 1520, 1531-34 (11th Cir.1996); *Wallace v. Morrison,* 87 F.3d 1271, 1274 (11th Cir.1996); *United States v. Darden,* 70 F.3d 1507, 1530-32 (8th Cir.1995); *Jones v. Plaster,* 57 F.3d 417, 420-22 (4th Cir.1995); *Holder v. Welborn,* 60 F.3d 383, 390-92 (7th Cir. 1995) (Cudahy, J., dissenting in part)

(advocating application of mixed motive analysis).

The majority also observed that, whereas this Circuit had previously implicitly endorsed mixed motive analysis in *United States v. Thompson,* 827 F.2d 1254, 1260 (9th Cir.1987), but "withheld judgment 'on the issue [of] whether a mixed-motive defense in *Batson* jury challenge cases is a valid one" in *Johnson v. Vasquez,* 3 F.3d 1327, 1329 n.3 (9th Cir.1993), this Circuit apparently endorsed mixed motive analysis in *Lewis v. Lewis,* 321 F.3d 824, 831 (9th Cir. 2003), and *McClain v. Prunty*, 217 F.3d 1209, 1221 (9th Cir.2000). *Kesser*, 392 F.3d at 337-38.

Finally, the majority observed that the Supreme Court and the Ninth Circuit have utilized mixed motive analysis in evaluating equal protection claims in both civil and Title VII contexts. *Kesser*, 392 F.3d at 339-40, citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266, 270 (1977), *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002) (en banc).

The majority also relied on *Batson* and *Swain v. Alabama*, 380 U.S. 202, 224 (1965), *overruled in part by Batson*, 476 U.S. at 100, n.25, as well as *Hernandez v. New York*, 500 U.S. 352, 360 (1991), for the proposition that the Supreme Court "has never suggested, and certainly not held, that a discriminatory

intent is necessarily inherent in a prosecutor's explanation for a challenge where that explanation contains both proper and improper motives." *Kesser*, 392 F.3d at 339.

Also meritless is appellant's assertion that the prosecutor's reasons for striking the other two Native Americans (Lawton and Smithfield) were unreasonably evaluated by the state court of appeal and the majority in this case, thereby casting doubt on the prosecutor's credibility as to his reasons for challenging Rindels, i.e., rendering those reasons "pretextual" within the meaning of a *Batson* third-step inquiry into whether a defendant "'has carried his burden of proving purposeful discrimination.'" *Miller-El* , 537 U.S. at 338, quoted in *Kesser*, 392 F.3d at 341. The state court of appeal summarized the prosecutor's reasons for challenging Smithfield thus: "her husband was a recovering alcoholic and therefore she might form an empathy with defendants Kesser and Leahy, both of whom were recovering alcoholics. Although this was not the only reason given, it is a powerful reason, and one which alone justifies the exercise of a peremptory challenge against Smithfield." SER 20. That and other reasons given by the prosecutor were also summarized in the federal district court: Smithfield's uncle had been arrested for drunk driving; she had asked for a hardship exemption on the ground that she was the sole support for her family and was concerned

about any absence from her job as a teacher; and she had taken the additional step of writing the court a letter reemphasizing how important she thought her position was and how important she thought it was that she be there. 2001 WL 1352607 at *13.

Regarding Lawton, the court of appeal noted that the prosecutor cited the fact that she was married a man who had to pay court-ordered child support to a previous wife, she had a record of speeding tickets and a drunk driving arrest, she closely followed a publicized trial in which the acquitted defendants were represented by appellant's attorney, she faced a lengthy winter commute to trial, and she was "weak," "not overly educated," and said she would have great difficulty answering audibly if asked in open court if the verdict read was in fact her verdict. SER 21. The court of appeal found those reasons "solid," and the defendants' attack on them "weak and farfetched." SER 21.

The majority correctly disposed of this claim in its discussion of the third step in resolving a *Batson* issue. *Kesser*, 392 F.3d at 340-42. Noting that in *Batson*'s third step, the persuasiveness of the prosecutor's explanation, and the state court's finding of the absence of discrimination are a "'pure question of fact' accorded significant deference," *Miller-El*, 537 U.S. at 339, quoting *Hernandez*, 500 U.S. at 364, the majority correctly held that appellant had "failed to establish

intentional or purposeful discrimination on the part of the State." *Kesser*, 392 F.3d at 341-42. The majority concluded that appellant had failed to present clear and convincing evidence to rebut the presumption of correctness attached to the finding that the challenges were legitimate. *Id.* at 342.

In sum, the majority's application of a mixed motive analysis was proper, and it correctly concluded that the state court's resolution of the *Batson* issue on this ground was not an unreasonable application of relevant Supreme Court authority.

II.

THE MAJORITY PROPERLY REFUSED TO UNDERTAKE A COMPARATIVE JUROR ANALYSIS

Appellant, the dissent in this case, and one of the amici, argue that it was improper for the state court of appeal, and the majority here, to deny appellant the opportunity to attempt to show the prosecutor's explanation was pretextual by analyzing the voir dire and questionnaire responses of the jurors who were *not* challenged, i.e., by conducting what has been referred to as comparative juror analysis. On the contrary, the majority correctly held that appellant "'failed to develop the factual basis of his claim in State court proceedings'" by having failed to "seek a comparative analysis in the state trial court or ask the state appeal court to remand for such an analysis." *Kesser*, 392 F.3d at 343, quoting 28 U.S.C. § 2254(e)(2).

In faulting appellant for having failed to assert a comparative juror analysis argument during voir dire, the majority relied on *Miller-El*, 537 U.S. at 331-34, 343-44, where the defense had not only presented evidence as to the county prosecutor's past "pattern and practice of race discrimination" in jury selection, but also presented evidence pertaining to comparative juror analysis

after the case was remanded for a *Batson* hearing two years after the trial.[3/] In the case at bar, on the other hand (as the majority correctly noted) there was no attempt by any of the defense attorneys to assert a comparative juror analysis argument in their *Batson* motion. The three attorneys said nothing about any alleged similarities between the struck jurors and the selected jurors, and, since the trial court therefore had no duty to read the defense attorneys' minds and ask the prosecutor to respond to non-existent claims, the prosecutor had no opportunity to expound on his tactics throughout the different phases of jury selection. The majority properly observed that "comparative analysis in the trial court was preferable to comparative analysis on appeal." *Kesser*, 392 F.3d at 343, citing *People v. Johnson*, 47 Cal. 3d 1194, 767 P.2d 1047, 255 Cal. Rptr. 569 (1989). *Johnson* provides a compelling argument for restricting comparative juror analysis to the trial court, and prohibiting it on appeal where no such analysis was raised in the trial court. *Johnson*, 47 Cal. 3d at 1220-21. This Circuit in *Burks v. Borg*,

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3. Despite being faced with the language in the *Miller-El* opinion itself, appellant unsuccessfully sought to lodge with this Court the transcript of the remanded post-trial evidentiary hearing, in an effort to show that the hearing did not concern comparative juror analysis. What appellant failed to present to the court was the *Miller-El* trial court's post-hearing *findings* on the defendant's *Batson* motion. Appellant's petition relies on the hearing transcript, but is silent as to the findings filed by the trial court in that case. Because the court denied appellant's lodging request, we have no occasion to respond to appellant's claim concerning the content of that hearing.

27 F.3d 1424, 1429 (9th Cir. 1994) acknowledged, in reasoning virtually identical to that expressed in *Johnson*, that a trial attorney, in addition to being entitled to rely on subjective criteria such as body language, tone of voice, facial expression and demeanor, "is entitled to take account of the characteristics of the other prospective jurors against whom peremptories might be exercised; to reevaluate the mix of jurors and the weight he gives to various characteristics as he begins to exhaust his peremptories." *Id.* at 1429. Although *Burks* noted this Circuit's erstwhile disagreement with *Johnson* on the comparative juror analysis theory, it was quick to acknowledge that *Johnson*'s holding "has a claim to legitimacy as strong as our own." *Id.* at 1428. *Johnson*'s "claim to legitimacy" has now been recognized not only by the majority in this case, but in another case as well. *Boyd v. Newland*, 393 F.3d 1008, 1015 (9th Cir. 2004) ("Supreme Court precedent does not require courts to engage in comparative juror analysis for the first time on appeal").

As *Boyd* and the majority in the instant case observed, even though the Supreme Court in *Miller-El* used comparative juror analysis (at least in the context of deciding whether a certificate of appealability should issue), it did *not* do so in a vacuum, without a record of specific testimony, arguments and factual findings by the trial judge. In *Miller-El*, the Court *had* such a record, produced by the same

trial court judge who presided at that trial, at a time when the trial was still fresh in everyone's mind, and with the benefit of testimony and explanations provided by the prosecutors themselves and evaluated for factual accuracy by the trial judge.

Here, the defense attorneys chose to let this issue lie undisturbed until the time for factfinding was long past. Now, in the absence of any record on this issue that might provide guidance, and when the memories of the participants in this twelve-year-old trial have faded, it is simply impossible to go back and reconstruct a meaningful record of what the prosecutor's voir dire strategies might have been, and, just as important, to determine whether those reconstructed memories were in accord with the trial judge's reconstructed memories of the progress of voir dire. As the majority observed, "under AEDPA, 'prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an 'evidentiary hearing' in federal court." *Kesser*, 392 F.3d at 343, quoting *Williams*, 529 U.S. at 433. The majority correctly deferred to the state appeal court's finding that appellant has "failed to carry his burden of proving discriminatory intent or purpose," and holding that the state court's finding was not "'an unreasonable determination of facts *in light of the evidence presented in the State court proceeding.*'" *Kesser*, 392 F.3d at 343-44, quoting 28 U.S.C. §

2254(d)(2); emphasis supplied by the court.

CONCLUSION

Accordingly, appellee respectfully requests that the petition for rehearing and rehearing en banc be denied.

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Respectfully submitted,

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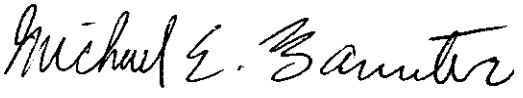

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